Hardial Singh Sekhon v Pegawai Buruh & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41-371 OF 1998
NIK HASHIM J
29 JULY 1999

Criminal Procedure *— Complaint — Dismissal of, by magistrate — Earlier order against complainant be restrained from instituting legal proceedings in court save by leave of judge — No appeal against order — Whether bar to application to magistrate for summons — Whether proceeding before magistrate is criminal or legal proceeding for which leave is required*

The appellant made a complaint against the Director General of Labour for an offence under s 166 of the Penal Code. The magistrate refused to take cognisance of the offence on the complaint on the ground, inter alia, that on 12 October 1990, the High Court in the case of *Hardial Singh a/l Hari Singh v Abu Talib bin Othman & Anor* Selangor Criminal Appeal 41-118-89 (*'Hardial Singh'*), had made an order that the appellant 'be restrained from instituting any legal proceedings in any court save by leave of a judge'. The appellant argued that: (i) the order in *Hardial Singh* is a nullity; and (ii) even if the order is valid, there is no bar to an application to a magistrate for summons as the proceeding before the magistrate is not a criminal or legal proceeding for which leave is required.

Held, dismissing the appeal:

Since there has been no appeal against the order, it must be taken as a valid order. The provision with regard to vexatious litigants is provided for under item 17 of the Schedule to the Courts of Judicature Act 1964 ('the Act'). The word 'proceeding' is defined under s 3 of the Act to mean any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding; *Re Bernard Boaler* [1915] 1 KB 21 distinguished. Therefore, the appellant was instituting a criminal proceeding when he swore upon oath the complaint before the magistrate. Since the appellant had no leave of a High Court judge, he had no right to apply for a summons. By lodging the complaint and making the application for a summons before the magistrate and launching the appeal before the court, the appellant had flagrantly violated the order and abused the process of the courts (see pp 260D–E, 261G–C, E–F).

[Bahasa Malaysia summary

Pemohon telah membuat suatu aduan terhadap Ketua Pengarah Buruh atas kesalahan di bawah s 166 Kanun Keseksaan. Majistret enggan untuk mengambil perhatian tentang kesalahan di dalam aduan tersebut di atas alasan, inter alia, bahawa pada 12 Oktober 1990,

Mahkamah Tinggi di dalam kes *Hardial Singh a/l Hari Singh v Abu Talib bin Othman & Anor* Rayuan Jenayah Selangor 41–118–89 ('*Hardial Singh*'), telah membuat perintah bahawa perayu 'disekat daripada memulakan apa-apa prosiding di dalam mana-mana mahkamah kecuali dengan kebenaran seorang hakim'. Perayu menghujahkan bahawa: (i) perintah di dalam *Hardial Singh* merupakan suatu pembatalan; dan (ii) sekalipun perintah tersebut adalah sah, tiada rintangan terhadap suatu permohonan kepada seorang majistret untuk saman kerana prosiding di hadapan majistret tersebut bukan merupakan prosiding jenayah atau menurut undang-undang di mana kebenaran diperlukan.

Diputuskan, menolak rayuan tersebut:

Memandangkan tidak wujud sebarang rayuan terhadap perintah tersebut, ia mesti diambil kira sebagai suatu perintah yang sah. Peruntukan berkenaan dengan litigan yang menyusahkan diperuntukkan di bawah item 17 di dalam Jadual kepada Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Perkataan 'prosiding' ditafsirkan di bawah s 3 Akta tersebut sebagai bermaksud apa-apa prosiding sekalipun yang berunsur sivil atau jenayah dan termasuk permohonan pada mana-mana peringkat prosiding: *Re Bernard Boaler* [1915] 1 KB 21 dibeza. Oleh demikian, perayu telah memulakan suatu prosiding jenayah apabila beliau mengangkat sumpah terhadap aduan tersebut di hadapan seorang majistret. Memandangkan perayu tidak mendapat kebenaran daripada seorang hakim Mahkamah Tinggi, maka beliau tidak mempunyai hak untuk memohon suatu saman. Dengan mengemukakan aduan dan membuat permohonan untuk suatu saman di hadapan seorang majistret dan memulakan rayuan di hadapan mahkamah, perayu telah secara terang melanggar perintah tersebut dan menyalahgunakan proses mahkamah (lihat ms 260D–E, 261G–C, E–F).]

Notes

For cases on dismissal of complaint by magistrate, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1051–1052.

Cases referred to

Attorney General v Vernazza [1960] 3 All ER 97 (refd)
Bernard Boaler, Re [1915] 1 KB 21 (distd)
Hardial Singh a/l Hari Singh v Abu Talib bin Othman & Anor Selangor Criminal Appeal 41-118-89 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3, Schedule item 17
Criminal Procedure Code (FMS Cap 6) s 128(1)(a)
Vexatious Actions Act 1896 s 1 [UK]

Hardial Singh Sekhon (In person) for the appellant.
Stanley Augustin (*Deputy Public Prosecutor*) for the respondent.

Nik Hashim J:

Introduction

Encik Hardial Singh Sekhon ('the appellant'), who claimed to be an arbitrator by occupation, was dissatisfied with the decision of the learned magistrate who refused to take cognizance of an offence on the complaint made by the appellant.

The gist of his complaint sworn before the magistrate as appeared at p 19 of record, reads as follows:

> I'm applying for summons under s 136(1) of CPC against Tengku Dato' Omar bin Tengku Bot for an offence under s 166 Penal Code that Tengku Dato' Omar as the Director General of Labour being a public servant knowingly disobeyed the direction of law to perform his duties under the Employment Act 1955 by exceeding his jurisdiction. That with the intention to cause or knowing it to be likely that he will by such disobedience cause injury to me and my client Harbajhan Singh a/l Samund Singh.
>
> I was injured because I could not earn my livelihood as arbitrator and arbitrator advocate. Since the said Director General refused to direct Labour Officers including En Burhanuddin bin Mamat to allow me as arbitrator advocate to represent Harbajhan Singh in Labour Case No 204/97 and others who wanted me to act as arbitrator advocate in Labour Court.

It is to be noted that, besides the complaints against the Labour Officer and his Director General, the appellant too made a complaint against the honourable Attorney General ('the A-G') by his personal name alleging that the A-G:

> ... has not performed his statutory duties to implement the Legal Profession (Amendment) Act 1978 Act 419 by advising the Minister to amend LPA as passed by Parliament (at p 24).

I find the allegation against the A-G mischievous and has no substance whatsoever. However, the appellant withdrew the complaint against the A-G in the course of his argument before me.

Magistrate's decision

After hearing the complaint, the learned magistrate reserved her ruling and two days later she gave her decision in that she refused to take cognisance of the offence and this is what she said at pp 27 and 28 in her grounds of decision:

> Setelah mendengar aduan perayu, mahkamah telah mengambil keputusan untuk tidak mengambil 'cognisance' ke atas aduan perayu di bawah s 128 KAJ.

She gave three reasons for her decision:

> Mahkamah telah membuat keputusan atas alasan-alasan berikut:

(1) Setelah meneliti aduan perayu dan dokumen-dokumen yang disertakan, mahkamah mendapati tidak ada sebarang kesalahan jenayah telah dilakukan oleh mana-mana pihak. A

(2) Mahkamah ini tidak mempunyai bidang kuasa untuk mengeluarkan perintah seperti yang dipohon oleh perayu.

(3) Menurut kes 44-26-89, *Hardial Singh a/l Hari Singh v Abu Talib bin Othman & Anor*, mahkamah telah memutuskan perayu di atas adalah dihalang daripada memulakan apa-apa prosiding undang-undang di mana-mana mahkamah kecuali dengan kebenaran seorang hakim. mahkamah ini mendapati perayu tidak ada mendapat sebarang kebenaran dari mana-mana hakim sebelum memulakan prosiding ini. B

C

Appeal

Before me, the appellant took upon himself to argue the appeal. He contended that the order in *Hardial Singh v Abu Talib bin Othman* relied upon by the learned magistrate as her third ground to refuse to take cognisance of the offence, is a nullity. I find the contention has no merit. There has been no appeal against the order. Therefore, the order must be taken as a valid order. The order was made by Mahadev Shanker, J (as he then was) in Selangor Criminal Appeal 41-118-89 and Selangor Permohonan Jenayah No 44-26-89 dated 12 October 1990 (not reported) pursuant to the additional powers of the High Court under art 17 vexatious litigants to the Schedule of the Courts of Judicature Act 1964 ('the Act'). In his joint judgment of the above two cases, the learned judge concluded by saying: D E

> The sad result of all this is a history of vexatious litigation. Bearing in mind the Commentary in the *Supreme Court Practice* (1979) Vol 2 para 3390, I consider it desirable that he (the appellant) be restrained from instituting any further legal proceedings except under judicial supervision. I accordingly order that Hardial Singh Sekhon (the appellant) be restrained from instituting any legal proceedings in any court save by leave of a judge. A copy of this order shall be published in the Gazette. F

The order was duly published in Warta Kerajaan Persekutuan vide No 10937 dated 20 December 1990 which reads as follows: G

> Di Hadapan Yang Arif Hakim Dato' Mahadev Shanker
> pada 12 Oktober 1990
>
> *Perintah*
>
> Permohonan ini yang ditetapkan untuk perbicaraan pada 1 Februari 1990 dengan kehadiran En Hardial Singh a/l Hari Singh pemohon di dalam kes ini dan En Mohd Yusof bin Johor Ali Peguam Persekutuan bagi pihak responden dan setelah membaca notis usul dan afidavit yang difailkan bersama-sama ini dan setelah mendengar pihak-pihak ... adalah diperintahkan bahawa permohonan berkenaan dengan ini ditolak dan adalah juga diperintahkan bahawa pada menjalankan kuasa-kuasa yang diberi kepada mahkamah menurut item 17 di dalam Jadual kepada Akta Mahkamah Keadilan 1964, Hardial Singh Sekhon adalah dihalang daripada memulakan apa-apa prosiding undang-undang di mana-mana Mahkamah kecuali dengan H I

A kebenaran seorang hakim dan adalah diperintahkan selanjutnya bahawa satu salinan perintah ini akan diwartakan dalam warta.

Diberi di bawah kuasa dan meterai mahkamah pada 12 Oktober 1990.

Penolong kanan pendaftar
Mahkamah Tinggi
B Shah Alam
Selangor

The appellant contended that even if the order is valid, there is no bar to an application to a magistrate for a summons as the proceeding before the magistrate is not a criminal or legal proceeding for which leave is required
C and he cited the English Court of Appeal case of *In Re Bernard Boaler* [1915] 1 KB 21 in support. In that case, s 1 of the Vexatious Actions Act 1896 provides:

> It shall be lawful for the Attorney General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any
D reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, ... the Court may ... order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such
E proceeding.

Upon the application of the Attorney General, a Divisional Court made an order under the above section that no legal proceedings should be instituted by B in the High Court or in any other court unless he obtained the leave of the High Court or some judge thereof and satisfied the court or judge that
F the legal proceeding was not an abuse of the process of the court and that there was a prima facie ground for the proceeding.

It was held in that case that the words 'legal proceedings' in s 1 of the Vexatious Actions Act 1896 do not include criminal proceedings, and that therefore the order of the Divisional Court was no bar to an application to a magistrate for a summons by B upon an information sworn by him
G without the leave of the High Court or a judge thereof.

In our case, the provision with regard to vexatious litigants is provided for under item 17 of the Schedule to the Act which states:

> Vexatious litigants
>
> H Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a judge. A copy of any such order shall be published in the Gazette.

This power is an additional power given to the High Court. In my view, the
I purpose of this power is to protect the public from abuse of the process of the courts. Lord Denning in *Attorney General v Vernazza* [1960] 3 All ER 97 at p 101 said:

> No man, let alone a vexatious litigant, has a vested right to bring or continue proceedings which are an abuse of the process of the court.

Unlike the Vexatious Actions Act 1896, the word 'proceeding' in our case is defined under s 3 of the Act to mean any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding. Our act is clear in its terms and therefore, the decision, in *Re Bernard Boaler* that the words 'legal proceedings' do not include criminal proceedings as contended by the appellant, cannot be applied to our case. Thus, the appellant's application to the magistrate for a summons upon his complaint is an institution of a criminal proceeding.

The order made by the High Court on 12 October 1990 against the appellant is plain and unambigious that the appellant is a vexatious litigant. The order is absolute. It stipulates that the appellant 'be restrained from instituting any legal proceedings in any court save by leave of a judge.' Therefore, unless the appellant has the required leave, he is debarred at any stage of the criminal proceeding from making the complaint before any court and in this case, the Magistrate's Court, with a view to his taken action under the Criminal Procedure Code (FMS Cap 6) ('the Code') that some person has committed or is guilty of an offence. Indeed, I agree with the learned Deputy Public Prosecutor, Mr Stanley Augustin that lodging a complaint is the first start of the criminal proceeding in the magistrate's Court (s 128(1)(a) of the Code). The appellant was instituting a criminal proceeding when he swore upon oath the complaint before the magistrate. Since the appellant had no leave of a High Court judge, he had no right to apply for a summons.The application is legally unauthorized and in breach of the order. The order is still valid and binding on the appellant. Therefore, he must comply with it strictly, or else he runs the risk of being in contempt of court if he persists to break the order. It is in the appellant's interest to take note of the contents of the order that he cannot institute any legal proceedings in any court save by leave of a judge. By lodging the complaint and making the application for a summons before the magistrate and launching the appeal before me, the appellant had flagrantly violated the order and thus, he had certainly abused the process of the courts.

Conclusion

Accordingly, the learned magistrate is right when she said she had no jurisdiction to entertain the appellant's application. Indeed, on this ground alone, I consider it is sufficient for the appeal to be dismissed. Hence, the other issue whether the parties complained of had committed the alleged offence need not be considered at all.

Therefore, the appeal is dismissed.

Appeal dismissed.

Reported by Benjamin Yong